

Order of Service; Directing Defendant to File Dispositive Motion or Notice Regarding Such Motion
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§1915A(b)(1), (2). *Pro se* pleadings must, however, be liberally construed. *See Balistreri v. Pacifica Police Dep't.*, 901 F.2d 696, 699 (9th Cir. 1988).

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988).

B. Legal Claims

Plaintiff claims that on July 15, 2009, he informed McFarland that he needed urgent medical care. McFarland did not believe him and, subsequently, Plaintiff did not receive emergency care. As a result, claims Plaintiff, his medical condition worsened. Deliberate indifference to serious medical needs violates the Eighth Amendment's proscription against cruel and unusual punishment. *See Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992), *overruled on other grounds*, *WMX Technologies, Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc). A determination of "deliberate indifference" involves an examination of two elements: the seriousness of the prisoner's medical need and the nature of the defendant's response to that need. *See McGuckin*, 974 F.2d at 1059. Liberally construed, Plaintiff's complaint sets forth a cognizable claim of an Eighth Amendment violation.

CONCLUSION

1. The Clerk shall issue a summons, and the United States Marshal shall serve, without prepayment of fees, copies of the amended complaint in this matter (docket no. 6), all attachments thereto, and copies of this order on **Correctional Officer C. McFarland** at the **Correctional Training Facility in Soledad, CA**. The Clerk shall also serve a copy of this order on Plaintiff and mail a courtesy copy of the complaint to the California Attorney General's Office.

2. No later than **ninety (90) days** from the date of this order, Defendant shall file a motion for summary judgment or other dispositive motion with respect to the cognizable claim in the complaint.

1 a. If Defendant elects to file a motion to dismiss on the grounds that Plaintiff
 2 failed to exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a),
 3 Defendant shall do so in an unenumerated Rule 12(b) motion pursuant to *Wyatt v. Terhune*, 315
 4 F.3d 1108, 1119-20 (9th Cir. 2003).

5 b. Any motion for summary judgment shall be supported by adequate factual
 6 documentation and shall conform in all respects to Rule 56 of the Federal Rules of Civil
 7 Procedure. **Defendant is advised that summary judgment cannot be granted, nor qualified**
 8 **immunity found, if material facts are in dispute. If Defendant is of the opinion that this**
 9 **case cannot be resolved by summary judgment, she shall so inform the Court prior to the**
 10 **date the summary judgment motion is due.**

11 3. Plaintiff's opposition to the dispositive motion shall be filed with the court and
 12 served on Defendant no later than **thirty (30) days** from the date Defendant's motion is filed.

13 a. In the event Defendant files an unenumerated motion to dismiss under
 14 Rule 12(b), Plaintiff is hereby cautioned as follows:¹

15 The defendants have made a motion to dismiss pursuant to Rule 12(b) of
 16 the Federal Rules of Civil Procedure, on the ground you have not exhausted your
 17 administrative remedies. The motion will, if granted, result in the dismissal of
 18 your case. When a party you are suing makes a motion to dismiss for failure to
 19 exhaust, and that motion is properly supported by declarations (or other sworn
 20 testimony) and/or documents, you may not simply rely on what your complaint
 21 says. Instead, you must set out specific facts in declarations, depositions, answers
 22 to interrogatories, or documents, that contradict the facts shown in the defendant's
 23 declarations and documents and show that you have in fact exhausted your
 24 claims. If you do not submit your own evidence in opposition, the motion to
 25 dismiss, if appropriate, may be granted, and the case dismissed.

26 b. In the event Defendant files a motion for summary judgment, the
 27 Ninth Circuit has held that the following notice should be given to plaintiffs:

28 The defendants have made a motion for summary judgment by which
 they seek to have your case dismissed. A motion for summary judgment under
 Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your case.

Rule 56 tells you what you must do in order to oppose a motion for
 summary judgment. Generally, summary judgment must be granted when there is
 no genuine issue of material fact--that is, if there is no real dispute about any fact

¹ The following notice is adapted from the summary judgment notice to be given to pro se
 prisoners as set forth in *Rand v. Rowland*, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). See
Wyatt v. Terhune, 315 F.3d at 1120 n.14.

1 that would affect the result of your case, the party who asked for summary
2 judgment is entitled to judgment as a matter of law, which will end your case.
3 When a party you are suing makes a motion for summary judgment that is
4 properly supported by declarations (or other sworn testimony), you cannot simply
5 rely on what your complaint says. Instead, you must set out specific facts in
6 declarations, depositions, answers to interrogatories, or authenticated documents,
7 as provided in Rule 56(e), that contradict the facts shown in the defendants'
8 declarations and documents and show that there is a genuine issue of material fact
9 for trial. If you do not submit your own evidence in opposition, summary
10 judgment, if appropriate, may be entered against you. If summary judgment is
11 granted in favor of defendants, your case will be dismissed and there will be no
12 trial.

13 *See Rand v. Rowland*, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff is advised to read
14 Rule 56 of the Federal Rules of Civil Procedure and *Celotex Corp. v. Catrett*, 477 U.S. 317
15 (1986) (holding party opposing summary judgment must come forward with evidence showing
16 triable issues of material fact on every essential element of his claim). Plaintiff is cautioned that
17 failure to file an opposition to Defendant's motion for summary judgment may be deemed to be a
18 consent by Plaintiff to the granting of the motion, and granting of judgment against Plaintiff
19 without a trial. *See Ghazali v. Moran*, 46 F.3d 52, 53-54 (9th Cir. 1995) (per curiam); *Brydges v.*
20 *Lewis*, 18 F.3d 651, 653 (9th Cir. 1994).

21 4. Defendant shall file a reply brief no later than **fifteen (15) days** after Plaintiff's
22 opposition is filed.

23 5. The motion shall be deemed submitted as of the date the reply brief is due. No
24 hearing will be held on the motion unless the court so orders at a later date.

25 6. All communications by the Plaintiff with the court must be served on Defendant,
26 or Defendant's counsel once counsel has been designated, by mailing a true copy of the
27 document to Defendant or Defendant's counsel.

28 7. Discovery may be taken in accordance with the Federal Rules of Civil Procedure.
No further court order is required before the parties may conduct discovery.

For Plaintiff's information, the proper manner of promulgating discovery is to send
demands for documents or interrogatories (questions asking for specific, factual responses)
directly to Defendant's counsel. *See Fed. R. Civ. P. 33-34*. The scope of discovery is limited to
matters "relevant to the claim or defense of any party . . ." *See Fed. R. Civ. P. 26(b)(1)*.
Discovery may be further limited by court order if "(i) the discovery sought is unreasonably

1 cumulative or duplicative, or is obtainable from some other source that is more convenient, less
2 burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by
3 discovery in the action to obtain the information sought; or (iii) the burden or expense of the
4 proposed discovery outweighs its likely benefit.” Fed. R. Civ. P. 26(b)(2). In order to comply
5 with the requirements of Rule 26, before deciding to promulgate discovery Plaintiff may find it
6 to his benefit to wait until Defendant has filed a dispositive motion which could include some or
7 all of the discovery Plaintiff might seek. In addition, no motion to compel will be considered by
8 the Court unless the meet-and-confer requirement of Rule 37(a)(2)(B) and N.D. Cal. Local Rule
9 37-1 has been satisfied. Because Plaintiff is detained, he is not required to meet and confer with
10 Defendant in person. Rather, if his discovery requests are denied, and he intends to seek a
11 motion to compel, he must send a letter to Defendant to that effect, offering him one last
12 opportunity to provide him with the sought-after information.

13 8. It is Plaintiff’s responsibility to prosecute this case. Plaintiff must keep the Court
14 and all parties informed of any change of address and must comply with the Court’s orders in a
15 timely fashion. Failure to do so may result in the dismissal of this action for failure to prosecute
16 pursuant to Federal Rule of Civil Procedure 41(b).

17 IT IS SO ORDERED.

18 DATED: 1/21/11


LUCY H. KOH
United States District Judge